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No. 94-908

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In The

Supreme Court of the United States

October Term 1994

J. R. SIMPLOT COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

In its Brief in Opposition, the National Labor Relations Board argues that *Hudson Berlind Corp.*, 203 N.L.R.B. 421 (1973), enforced, 494 F.2d 1200 (2nd Cir.), cert. denied, 419 U.S. 897 (1974), does not apply to the case at bar because there was no competing union demanding recognition as there was *Hudson*. That ignores the issue in questions concerning representation cases, where the choice for employees is always whether to be represented by a union *at all*, and, if the employees so chose, what union to have represent them. The Quincy plant employees should have had that choice, regardless of the

fact that the union from the then-closed Ferndale plant did not assert jurisdiction over the employees. A large percentage of the workforce was new because the workforce more than doubled. Perhaps they wanted no union at all, or a different union. The Board's decision gave them no choice at all.

The Board also argues that because former Wenatchee plant employees hold the majority of the "projected year-round jobs," the Union should represent all of the employees. The fact is that the prime-processing season runs from early June until at least late November, and actually later because of the addition of certain potato products. Thus, while former Wenatchee plant employees may staff the repack area of the plant, (which, contrary to statements by the Board, does operate during prime-pack season), to allow those few employees to be determinative of the representation status of the entire operation completely disenfranchises *all* of the seasonal employees.

The Board's continued insistence that the May 25, 1990 "grand opening" constituted the date of "substantial completion" of the "transfer" of operations is completely unsupported by the evidence and was rejected by the Ninth Circuit. It is undisputed that only a small portion of the repack area was actually operational as of May 25th. If there is no prime packing, then there is no future repack, because the products repacked into small containers are those that were prime packed during the previous harvest season.

The Board does not address the entire issue of disenfranchisement of seasonal employees, nor does it address the fact that *Harte & Co.*, 278 N.L.R.B. 947 (1986), did not

address seasonal employment because Harte & Co. was not a seasonal employer. This issue has not been previously addressed by the Board or the courts. Should the "substantially complete" transfer rule applied to a year-round employer be the same for seasonal employers in light of the Board's clearly-stated representation-election policy of having elections at peak season?

There was also no support for the ALJ's determination that the workers hired for the 1990 peak season "are not likely to be around at the next year's seasonal peak." (Pet. App. 75). The Personnel Manager, John Stone, testified that previous seasonal employees are notified and that there was an estimated forty percent turnover rate. Thus, there must be a return of approximately sixty percent of the seasonal employees each year.

Finally, the Board argues that the cases cited in Appellant's opening brief are "factually distinguishable" but then does not distinguish them – because it cannot. In *American Fluorescent Corp.*, 275 N.L.R.B. 1097 (1985), the Board held the employer's refusal to bargain lawful because only 12 of the 63 employees were transferees from the old facility. In the case at bar, as of the time the transfer was substantially complete and the Quincy plant was able to prime pack all vegetables harvested at that time, only 135 of 431 employees were transferees from the Wenatchee plant.

The Board also did not address the fact, as it attempted to distinguish *Massachusetts Machine & Stamping v. N.L.R.B.*, 578 F.2d 15 (1st Cir. 1978), that the court therein deemed important the fact that the employer, upon opening the new plant, had a reasonable expectation that additional new hires

would be added to its workforce at the new plant "within a very short period of time." Id. at 18-19. This was precisely the case at the Quincy plant in June, 1990 – the Company anticipated adding 300 employees in short order to process the many different varieties of vegetables that it had not processed in the Wenatchee plant.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

DATED this 8th day of February, 1995.

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